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Teoh Kah Keng v Chow Chee Keong

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-246–06 OF 2018
WONG CHEE LIN JC
24 MAY 2019

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Contract — Misrepresentation — Fraudulent misrepresentation — Whether plaintiff proved on a balance of probabilities that the defendant made representation as to the value of the company — Whether the misrepresentations were probable given the sequence of events — Damages — Whether plaintiff provided sufficient evidence that he suffered losses

D

Tort — Defamation — Determination of — Defendant in counterclaim alleged email sent was defamatory — Whether contents of email amounted to defamation — Whether plaintiff's defence applicable — Whether damages suffered by defendant

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This was an action by the plaintiff for misrepresentation along with a counterclaim from the defendant, for defamation. The defendant was a managing director and shareholder of a company known as Whitespace Sdn Bhd ('WSSB') and Darul Inspired Sdn Bhd. In July 2015, the plaintiff, who has known the defendant for more than 20 years approached the defendant enquiring of any job openings. In August 2015, the defendant informed the plaintiff of an opportunity to open a branch in November 2015 at Qliq Hotel, Damansara Perdana. The position offered was Head of Engagement with a monthly salary of RM4,000 and also as Director of WSSB provided that the plaintiff invested and held a stake in WSSB. It was initially agreed that the plaintiff would purchase 3% equity in WSSB for RM250,000 with RM250,000 for the balance 2% at a later date. The plaintiff alleged that the defendant had represented to him that the gross revenue of WSSB was RM1.2m and that WSSB was valued at RM10m, which was confirmed by the firm Ernst & Young ('E&Y'). The plaintiff further alleged that the defendant represented that WSSB would be listed in the share market and there would be huge awards if he agreed to invest in 5% shares. On 11 September 2015, the plaintiff issued a cheque for RM250,000 to the defendant and in turn the defendant transferred 3% of the WSSB shares to the plaintiff. On 1 October 2015, the plaintiff was also engaged as Head of Engagement in WSSB. On 12 December 2015 there was a meeting between the plaintiff and the defendant where the issue of the balance 2% shares to be purchased by the plaintiff came up but no decision was made by the plaintiff. The plaintiff then

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decided not to proceed with the purchase of the remaining 2% shares and also resigned from WSSB on 31 December 2015. In early December 2015, a company called VOffice Sdn Bhd planned to merge with WSSB. E&Y was formally appointed in January 2016 as consultants for the merger. On 11 March 2016, E&Y produced a feasibility merger roadmap and according to the defendant, E&Y had valued WSSB at RM12m. The defendant was not given a valuation report. There was also the matter of a non-disclosure agreement that prevented the plaintiff from discussing the report. On 15 May 2017 the plaintiff sent an email to the defendant seeking clarification on the status of his investment and expressing his general disappointment in his dealings with the defendant, especially where he was not given access to the report by E&Y. On 25 May 2017, the plaintiff replied via email, copying the company secretary, providing an explanation for the matters raised in the previous email. The plaintiff then responded on 17 July 2017, also copying the company secretary. The plaintiff alleged that the defendant made the following misrepresentations: (a) WSSB was worth RM10m as confirmed by E&Y; (b) WSSB had an annual gross income of RM1.2m; and (c) WSSB had good prospects for expansion and future listing on the stock exchange. The plaintiff also alleged: (i) at the material time, WSSB was suffering losses and was nowhere close to having an annual gross income of RM1.2m and nowhere colse to being worth RM10m; (ii) the defendant concealed the fact that WSSB was a separate entity from White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd; and (iii) the defendant concealed that the annual gross income represented was actually a cumulative gross income figure for all three separate entities. The defendant, in his counterclaim, alleged that the email dated 17 July 2017 defamed him and had been published to a third party, ie the company secretary of WSSB.

Held, dismissing the plaintiff's claim with costs of RM30,000 subject to allocator and allowing the defendant's counterclaim with damages of RM20,000 with interest at the rate of 5%pa:

(1) The defendant could not have represented that E&Y had valued WSSB at RM10m in August 2015, as alleged by the plaintiff. This was because E&Y were only appointed in January 2016 as they were only appointed in respect of the proposed merger with VOffice Sdn Bhd. Because of this inherent probability, the court was of the view that the plaintiff had not proved on a balance of probabilities that the defendant had in fact made such a representation. The defendant had also stoutly denied making such a representation and there was nothing to suggest that the defendant was not telling the truth (see paras 39 & 41).

(2) For the representation that the gross annual income of WSSB was RM1.2m, the only evidence available was that of the plaintiff. It was inherently improbable that such a representation was made by the defendant as, according to the plaintiff himself, the defendant had shown

him audited accounts of WSSB for the years 2012–2014 on the defendant's laptop for the plaintiff to see for himself. The defendant's explanation that he was representing the gross income of the three branches cumulatively to be RM1.2m was more credible. Further, if the plaintiff had seen the audited accounts for all three branches/entities and it was shown that the gross annual income for the year ended 31 December 2014 was cumulatively approximately RM1.2m, this supported the defendant's version of facts. Therefore, there was no misrepresentation made by the defendant with regards to the gross annual income of RM1.2m (see paras 43–44).

(3) With regards to the potential of listing of WSSB, the plaintiff had not proved on a balance of probabilities that the defendant did not genuinely believe at the material time, that his vision was to list WSSB and if that happened, there was no doubt that the plaintiff's shares would be worth a substantial amount. Accordingly, the court was of the view that the plaintiff had not proved on a balance of probabilities that the defendant was guilty of misrepresentation (see paras 45–46).

(4) The plaintiff must prove loss. The plaintiff's application of a multiplier of 1.5 and valuation of the shares at RM13,500, was 'plucked from thin air' and no evidence was produced as to the value of the shares. Since the plaintiff could not prove its damages suffered, the court could not even award nominal damages. The claim was accordingly dismissed on the basis the plaintiff had not proved misrepresentation and also failed to adduce sufficient evidence of its loss of damages (see paras 49–50).

(5) With regards to the counterclaim of defamation, upon reading the plaintiff's email to the defendant as a whole, the court was of the view that it was defamatory to the defendant. This was because the words in the email implied that the defendant had no credibility, was a liar that did not keep his promise and had made false representations to the plaintiff. It also implied that the defendant had improperly used the plaintiff's money (see paras 54–55).

(6) On defence of justification, the burden of proof was on the plaintiff to show that the defamatory imputations were true. As the court had held that the defendant had not made any misrepresentations to the plaintiff, it followed that the plaintiff would not have succeeded in his defence of justification. As for the defence of fair comment, the defamatory words were based on the fact that the defendant had allegedly gone back on his promise to make the plaintiff a director of WSSB upon the plaintiff purchasing 5% shares in WSSB. That was a fact which had not been proved sufficiently by the plaintiff. As such, the defence of fair comment did not avail the plaintiff. In respect of qualified privilege, the company secretary certainly had no interest in disputes between shareholders as to the value of their shares in the company or when they would be made

director and even if it can be said that other shareholders had interest, that cannot be said to be the case of the company secretary (see paras 56, 58 & 61).

[Bahasa Malaysia summary

Ini adalah tindakan oleh plaintif untuk salah nyata dan juga tuntutan balas oleh defendan, untuk fitnah. Defendan adalah pengarah urusan dan pemegang saham sebuah syarikat yang dikenali sebagai Whitespace Sdn Bhd ('WSSB') dan Darul Inspired Sdn Bhd. Pada Julai 2015, plaintif, yang telah mengenali defendan lebih daripada 20 tahun telah menemui defendan untuk bertanyakan jawatan kosong. Pada bulan Ogos 2015, defendan memaklumkan kepada plaintif terdapat peluang untuk membuka cawangan pada November 2015 di Qliq Hotel, Damansara Perdana. Jawatan yang ditawarkan adalah 'Head of Engagement' dengan gaji bulanan sebanyak RM4,000 dan juga sebagai Pengarah WSSB dengan syarat plaintif melabur dan memegang saham dalam WSSB. Pada mulanya dipersetujui bahawa plaintif akan membeli ekuiti 3% dalam WSSB bernilai RM250,000 dengan RM250,000 untuk baki 2% pada masa akan datang. Plaintif mendakwa bahawa defendan telah memberikan representasi kepada beliau bahawa hasil kasar WSSB adalah RM1.2 juta dan WSSB bernilai RM10 juta, yang mana telah disahkan oleh firma Ernst & Young ('E&Y'). Plaintif selanjutnya mendakwa bahawa defendan telah memberikan representasi bahawa WSSB akan disenaraikan dalam pasaran saham dan akan mendapat pulangan yang besar sekiranya beliau bersetuju untuk melaburkan 5% saham. Pada 11 September 2015, plaintif mengeluarkan cek sebanyak RM250,000 kepada defendan dan seterusnya defendan memindahkan 3% saham WSSB kepada plaintif. Pada 1 Oktober 2015, plaintif juga terlibat sebagai Head of Engagement dalam WSSB. Pada 12 Disember 2015 terdapat pertemuan antara plaintif dan defendan di mana isu baki 2% saham yang akan dibeli oleh plaintif timbul namun tiada keputusan dibuat oleh plaintif. Plaintif kemudian memutuskan untuk tidak meneruskan pembelian baki 2% saham dan juga meletak jawatan dari WSSB pada 31 Disember 2015. Pada awal Disember 2015, sebuah syarikat yang dikenali sebagai VOffice Sdn Bhd merancang untuk bergabung dengan WSSB. E&Y dilantik secara rasmi pada Januari 2016 sebagai perunding bagi penggabungan itu. Pada 11 Mac 2016, E&Y menyediakan pelan tindakan penggabungan dan menurut defendan, E&Y telah mebuat penilaian bahawa WSSB bernilai RM12 juta. Defendan tidak diberikan laporan penilaian. Terdapat juga perkara iaitu perjanjian bukan kerahsiaan yang menghalang plaintif daripada membincangkan laporan tersebut. Pada 15 Mei 2017, plaintif menghantar emel kepada defendan memohon penjelasan mengenai status pelaburan beliau dan menyatakan kekecewaan beliau dalam berurusan dengan defendan, terutamanya apabila beliau tidak diberikan akses kepada laporan oleh E&Y. Pada 25 Mei 2017, plaintif membalas melalui emel, menghantar salinan kepada setiausaha syarikat, memberikan penjelasan mengenai perkara yang dibangkitkan dalam emel sebelumnya. Plaintif kemudian menjawab pada

17 Julai 2017, juga menghantar salinan kepada setiausaha syarikat. Plaintif mendakwa bahawa defendan membuat salah nyata seperti berikut: (a) WSSB bernilai RM10 juta seperti yang disahkan oleh E&Y; (b) WSSB mempunyai pendapatan kasar tahunan sebanyak RM1.2 juta; dan (c) WSSB mempunyai prospek yang baik untuk perkembangan dan disenaraikan di bursa saham kelak. Plaintif juga mendakwa: (i) pada masa yang material, WSSB telah mengalami kerugian yang mana tidak hampir dengan pendapatan kasar tahunan RM1.2 juta dan tidak hampir bernilai RM10 juta; (ii) defendan menyembunyikan fakta bahawa WSSB adalah entiti berasingan dari White Space (Bangsar) Sdn Bhd dan White Space (Puchong) Sdn Bhd; dan (iii) defendan menyembunyikan bahawa pendapatan kasar tahunan yang dinyatakan sebenarnya adalah merupakan angka pendapatan kasar kumulatif bagi ketiga-tiga entiti berasingan tersebut. Defendan, dalam tuntutan balas beliau, mendakwa bahawa emel bertarikh 17 Julai 2017 adalah fitnah terhadap beliau dan telah diterbitkan kepada pihak ketiga, iaitu setiausaha syarikat WSSB.

Diputuskan, menolak tuntutan plaintif dengan kos RM30,000 tertakluk kepada alokatur dan membenarkan tuntutan balas defendan dengan kerugian sebanyak RM20,000 dengan faedah pada kadar 5% setahun:

(1) Defendan tidak boleh memberikan representasi bahawa E&Y telah menilai WSSB sebanyak RM10 juta pada bulan Ogos 2015, seperti yang didakwa oleh plaintif. Ini kerana E&Y hanya dilantik pada Januari 2016 kerana mereka hanya dilantik berkenaan dengan penggabungan yang dicadangkan dengan VOffice Sdn Bhd. Kerana kebarangkalian yang wujud ini, mahkamah berpendapat bahawa plaintif tidak membuktikan imbangan kebarangkalian bahawa defendan sebenarnya telah membuat representasi tersebut. Defendan juga sekerasnya menafikan membuat representasi sedemikian dan tidak ada apa menyatakan bahawa defendan tidak bercakap benar (lihat perenggan 39 & 41).

(2) Bagi representasi bahawa pendapatan tahunan kasar WSSB adalah RM1.2 juta, satu-satunya bukti yang terdapat ialah plaintif. Ia sememangnya mustahil bahawa representasi sedemikian dibuat oleh defendan kerana, menurut plaintif sendiri, defendan telah menunjukkan kepada beliau akaun WSSB yang telah diaudit bagi tahun 2012–2014 di komputer riba milik defendan untuk dilihat oleh plaintif sendiri. Penjelasan defendan bahawa beliau memberikan representasi bahawa pendapatan kasar ketiga-tiga cawangan yang secara keseluruhan menjadi RM1.2 juta adalah lebih dipercayai. Tambahan pula, jika plaintif telah melihat akaun yang telah diaudit bagi ketiga-tiga cawangan/entiti tersebut dan ia menunjukkan bahawa pendapatan tahunan kasar bagi tahun berakhir 31 Disember 2014 adalah secara keseluruhannya sebanyak RM1.2 juta, ini menyokong fakta versi defendan. Oleh itu, tidak ada salah nyata yang dibuat oleh defendan berkenaan dengan

pendapatan tahunan kasar sebanyak RM1.2 juta (lihat perenggan 43-44).

(3) Berkenaan dengan potensi penyenaraian WSSB, plaintif tidak membuktikan pada imbangan kebarangkalian bahawa defendan tidak benar-benar percaya pada masa-masa material, bahawa visi beliau adalah untuk menyenaraikan WSSB dan jika ianya berlaku, tidak diragui bahawa saham plaintif akan bernilai besar. Oleh itu, mahkamah berpendapat bahawa plaintif tidak membuktikan pada imbangan kebarangkalian bahawa defendan bersalah untuk salah nyata (lihat perenggan 45–46).

(4) Plaintif haruslah membuktikan kerugian. Permohonan plaintif bagi pengganda 1.5 dan penilaian saham pada RM13,500, telah 'dipetik dari angin' dan tidak ada bukti yang diberikan mengenai nilai saham tersebut. Memandangkan plaintif tidak dapat membuktikan kerugian yang dialami, mahkamah tidak dapat memberikan ganti rugi nominal. Tuntutan tersebut telah ditolak atas dasar bahawa plaintif tidak membuktikan salah nyata dan juga gagal memberikan bukti yang mencukupi mengenai kerugian beliau (lihat perenggan 49–50).

(5) Berhubung dengan tuntutan balas fitnah, apabila membaca emel plaintif kepada defendan secara menyeluruh, mahkamah berpendapat bahawa ia adalah fitnah kepada defendan. Ini kerana perkataan dalam emel menyatakan bahawa defendan tidak mempunyai kredibiliti, adalah pembohong yang tidak menepati janji dan telah membuat representasi palsu kepada plaintif. Ia juga menyatakan bahawa defendan menggunakan wang plaintif secara salah (lihat perenggan 54–55).

(6) Mengenai pembelaan justifikasi, beban bukti adalah pada plaintif untuk menunjukkan bahawa imputasi fitnah adalah benar. Memandangkan mahkamah berpendapat bahawa defendan tidak membuat apa-apa salah nyata kepada plaintif, ianya berturutan bahawa plaintif tidak akan berjaya dalam pembelaan justifikasi beliau. Bagi pembelaan komen berpatutan, kata-kata fitnah adalah berdasarkan kepada fakta bahawa defendan telah didakwa berjanji untuk menjadikan plaintif sebagai pengarah WSSB apabila plaintif membeli 5% saham dalam WSSB. Itulah fakta yang belum dibuktikan dengan sepenuhnya oleh plaintif. Oleh itu, pembelaan komen berpatutan tidak menyelamatkan plaintif. Berhubung dengan pembelaan bersyarat, setiausaha syarikat pastinya tidak mempunyai kepentingan dalam pertikaian antara pemegang saham mengenai nilai saham mereka dalam syarikat itu atau apabila mereka akan dijadikan pengarah dan walaupun ia boleh dikatakan bahawa pemegang saham lain yang mempunyai kepentingan, ianya tidak sama sekali dengan setiausaha syarikat (lihat perenggan 56, 58 & 61).]

Notes

For cases on fraudulent misrepresentation, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6446–6469.

For a case on determination of defamation, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 520.

Cases referred to

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Indran a/l V Kumaraguru (Tanusha Dewi with him) (Krishna Dallumah & Indran) for the plaintiff.

Jadadish Chandra (Jagshey Pipariya with him) (Arbain & Co) for the defendant.

Wong Chee Lin JC:

[1] This is an action by the plaintiff for misrepresentation against the defendant and there is a counterclaim by the defendant for defamation against the plaintiff. I have dismissed the plaintiff's claim and allowed the defendant's counterclaim. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[2] The plaintiff and the defendant were schoolmates in Sekolah Menengah Taman Desa and have known each other for more than 20 years. They were good friends and trusted one another.

[3] The defendant is a managing director and a shareholder of a company known as Whitespace Sdn Bhd ('WSSB') and Darul Inspired Sdn Bhd ('DISB').

[4] In July 2015, the plaintiff approached the defendant to ask whether there was any job opening for him. At that time, the defendant did not have any job opening for the plaintiff and told him so. In August 2015, the parties met again and this time, the defendant told the plaintiff that he had the opportunity to open a branch at Qliq Hotel, Damansara Perdana and the defendant told the plaintiff that he could offer him the position of Head of Engagement and Director of WSSB provided he invested and held a stake in WSSB.

A **[5]** More specifically, it is not disputed that the defendant represented to the plaintiff that he was to be appointed as a director at WSSB and was to be paid a director fee of RM2,499 per month if the plaintiff purchased 5% equity in WSSB for the sum of RM500,000.

B **[6]** The defendant also represented that the plaintiff will also be appointed as the head of engagement with a monthly salary of RM4,000.

[7] The defendant further represented that WSSB will open its fourth branch at Qliq Hotel, Damansara Perdana in November 2015.
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[8] What is in dispute is whether the defendant at that time also made additional representations to the plaintiff to induce him into buying shares in WSSB. The plaintiff alleged that the defendant had represented to him that the
D gross revenue of WSSB was RM1.2m and that WSSB was valued at RM10m as confirmed by the firm of Ernest & Young. The plaintiff also alleged that the defendant represented to him that WSSB would be listed in the share market in due course and that would bring huge rewards if he agreed to invest in the 5% shares.
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[9] The plaintiff informed the defendant about his financial constraints in the purchase of wssb shares and it was agreed that initially, the plaintiff would purchase 3% equity in WSSB for RM250,000 with the other RM250,000 for the balance 2% at a later date.
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[10] On 11 September 2015, the plaintiff through his father issued a Hong Leong Bank cheque No 228435072414423 amounting to the sum of RM250,000 to the defendant for investment and the defendant then transferred 3% of the WSSB shares to the plaintiff and the share certificate was
G issued in the plaintiff's name on 28 September 2015.

[11] The plaintiff was engaged as Head of Engagement in WSSB and started work on 1 October 2015.
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[12] The defendant introduced the plaintiff to one Edwin Foo from Hong Leong Bank with regard to the balance RM250,000 required for the purchase of the balance 2% shares.

I **[13]** The plaintiff's loan for RM250,000 from Hong Leong Bank was approved on 9 December 2015.

[14] On 12 December 2015 there was a meeting between the plaintiff, his father and the defendant. There is a dispute as to who suggested the meeting.

The plaintiff alleged that the meeting was called at the request of the defendant. The defendant said that it was called at the suggestion of the plaintiff. What is not disputed is that the issue of the plaintiff purchasing the balance 2% of the shares in WSSB came up and was discussed but no decision was made by the plaintiff.

[15] Eventually the plaintiff decided not to proceed with the purchase of the balance 2% shares and the plaintiff resigned from WSSB on 31 December 2015.

[16] Sometime in early December 2015, a company called VOffice Sdn Bhd planned to merge with WSSB and appointed Ernst & Young as consultant to conduct the due diligence, market study and feasibilities along with relevant valuations for the merger exercise. Ernst & Young was also tasked to produce a probable roadmap and timeline for the merger. Ernst & Young's appointment was formalised in January 2016.

[17] On 11 March 2016, Ernst & Young produced a feasibility merger roadmap for both VOffice Sdn Bhd and WSSB. According to the defendant, Ernst & Young had valued WSSB at RM12m for this purpose.

[18] A copy of the valuation was not given by the defendant to the plaintiff. The defendant claims that he wanted to discuss the report with the plaintiff and guide him through it and, due to a non-disclosure agreement signed, the consent of VOffice Sdn Bhd and Ernst & Young was required before the report can be disclosed to the plaintiff. The defendant called the plaintiff on the phone at least twice but the plaintiff did not answer his call. As a result, the plaintiff was not given a copy of the valuation report.

[19] The plaintiff met with the defendant at the annual general meeting ('AGM') of WSSB on 30 June 2016. Unknown to the defendant, the plaintiff had recorded what transpired at the AGM in his handphone and he produced a transcript of what transpired during the AGM for purpose of the trial.

[20] The admissibility of the transcript is in issue but I note that nowhere in the plaintiff's submission has he relied on the transcript. According to the transcript, the defendant had said at the AGM that Ernst & Young had valued WSSB at RM12m for purposes of the merger with VOffice Sdn Bhd.

[21] On 15 May 2017, almost a year after the AGM, the plaintiff sent an email to the defendant wherein he said the following:

> You have painted me a rosy picture by claiming that Ernst & Young had valued White Space Sdn Bhd to be RM10 million and on numerous occasions you have

shrewdly claim that the evaluation stands. When I purchased the shares, in accordance to your claim, I got my parents to loan me RM250 thousand and to take up a loan of another RM250 thousand from the bank to fulfil YOUR asking price of RM500 thousand for the 5 shares.

I trusted you completely and in fact, you told me that I will be in the 'know' as I was to be appointed director of the 'holding company' as part of the deal to purchase the 5 shares of the company with further enticement of director fees to be RM2,499 per month and greater appreciation in value by future 'listing' the company in a stock exchange. However, as I was never appointed director due to your whim and fancy, it is no doubt that you did not honour your words but further to that, I now read the EDM which states that the branch in Solaris is going to be closed with immediate effect on the 31st of May 2017.

I am disheartened by this news and I now seek further clarification to what would become of my investment? By all means, this RM250 thousand is hard earned money, blood and sweat!! As it is I am not getting any returns via the director fees or employment salary.

Let me have the Ernst & Young evaluation of the company which states that the company is worth RM10 million as you claimed. You have never given me any such document after many times of asking. Let me know what are the steps you would be taking to ensure that the company is on-going profitable and is worth the monies that I have invested based on what you told me.

Please reply in writing.

[22] The defendant replied via email to the plaintiff on 25 May 2017 and copied this email to the company secretary of WSSB. This is what the defendant said in his email:

I refer to your email dated 15 May 2017.

For the record, you have requested for a meet sometime in June/July 2015, intended to explore if there is any job opportunity in Whitespace. Our conversation was concise, there was no job offer, unless you are prepared to acquire Whitespace share or you may consider to open a new branch with Whitespace management program.

Sometime in August 2015, Whitespace was approached by Qliq Hotel at Damansara Perdana, intending to appoint Whitespace to operate serviced office & co-working space. We then further discuss if you would be keen to participate, the options were direct, you will need to acquire 5% share in exchange of RM500,000 for Whitespace to offer you a job at RM4,000 per month plus appointing you as a director with monthly RM2,499 director's fee.

You have agreed, however you could only pay RM250,000 on Sept 2015 and the balance RM250,000 was pending your mortgage drawdown, which was targeted to be sometime in Nov/Dec 2015. We then agreed to apportion the share of RM250,000 for 3% and the balance RM250,000 for 2% (to make up the agreed 5%), while the appointment of directorship shall only happen upon your readiness to pay the balance RM250,000.

Whitespace has extended an employment offer letter dated 15.9.2015 offering a job starting from 1.10.2015 as Head of Engagement with RM4,000 monthly salary. Sad to say, you have abandoned your employment and also fail to pay up the balance RM250,000 in Dec 2015.

FYI, in Dec 2015, we began a merger and acquisition discussion to bring Whitespace to greater heights. The merger entities (Whitespace & VOffice) began preliminary discussion with EY to frame possibilities. In Jan 2016, both merger entities have decided to appoint EY to carry out studies, due diligence, market assessments, chum a merger structure and pitch for funding for regional expansion. After series of meetings, in-depth evaluations were carried out by the consultant, EY's proposed merger report was ready sometime in March 2016. This report is available for viewing by concerning parties upon consent by VOffice/Whitespace/EY, due to non disclosure clauses.

You have raised several questions during Whitespace AGM held on 30.6.2016 at 10am. We believed company secretary & stakeholders have responded accordingly, where motions were moved & seconded.

Kindly note that the decisions to close Solaris Mont Kiara branch was reached after Directors meeting held in early 2017. Reason being poor maintenance of the common area by building owner coupled with several lift breakdown incidences, resulting in poor customers' journey. The decision was taken in the larger interest of the Company to ensure the operation is consolidated such that the Company would be lean and mean to counter all challenges and competition that will be faced in the future.

The closure of Solaris Mont Kiara branch will not affect your present shareholding in the Company.

We are managed in a professional manner and several other aspects of related businesses are being studied and if appropriate, will be considered by the Company.

[23] In response, the plaintiff sent the following email to the defendant on 17 July 2017 and also copied the company secretary:

I know that you have not denied that you have painted a rosy picture that Ernst & Young valued Whitespace S/B to be RM10 million. I further note that you have not denied your knowledge that I have obtained a loan from my parents nor have you denied that I was to be a Director of the 'Holding Company'. It was never agreed that my directorship was upon payment of the full RM500 thousand. Either way, you took the money and use it to pay your debts and took your family on a trip to Japan.

You were aware that I was pursuing a bank loan for the balance of RM250 thousand which had later been approved but by which at an earlier point in time, you had put additional conditions to what was agreed namely to the directorship ie You informed me that I will not become a director but instead I have to work towards becoming one; further to that I have to pay up the remaining RM250 thousand. You think you have any credibility?

I am not aware of any merger nor have I been informed of any AGM this year (2017). My queries at the last AGM (2016) were not satisfactorily answered and I

deny that the secretary & stakeholders had responded adequately. I have not been informed of any replacement for the Solaris Mont Kiara branch and how can the company be lean and mean when one of the sources of income for this company has been closed?

Although it does not affect the amount of my shareholding, it does affect the value of my shareholding — I do not agree with your last paragraph and it is clear that the value of my shareholdings have never been equivalent to what you have represented to me ie based on RM10 million valuation.

Let me have the said evaluation that you claimed.

[24] The defendant took objection to the email sent by the plaintiff on 17 July 2017 and alleged that the email defamed the defendant and had been published to a third party namely the company secretary of WSSB. Whilst the plaintiff sued the defendant for misrepresentation, the defendant counterclaimed against the plaintiff for defamation.

SUMMARY OF THE PLAINTIFF'S CASE

[25] The plaintiff alleged that the following misrepresentations had been made by the defendant to him:

(a) that WSSBS was worth RM10m as confirmed by Ernst & Young;

(b) that WSSB had an annual gross income of RM1.2m; and

(c) that WSSB had good prospects for expansion and future listing on the stock exchange.

[26] The plaintiff alleged that the abovesaid representations were made fraudulently and at the material time in 2014, WSSB was suffering net losses of RM44,831, had accumulated losses exceeding RM518,683, had current liabilities of RM760,349 and was nowhere close to having an annual gross income of RM1.2m and nowhere close to being worth RM10m. To compound matters further, it was submitted that the defendant wilfully concealed the fact that WSSB was a separate entity from White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd and the fact that the annual gross income represented was actually a cumulative gross income figure for all three separate entities.

[27] The plaintiff admitted that he saw the negative figures in the audited accounts that were shown to him on the defendant's laptop but he proceeded with the agreement because the defendant had stated that it was merely a paper loss and a common practice of every company.

[28] The plaintiff submitted that he did not proceed with the purchase of the 2% shares as prior to that, the defendant had told him that he would not be made a director even if he paid the balance sum of RM250,000 and that the plaintiff would have to work towards becoming a director. Further, by then, the plaintiff already had an indication that WSSB was not doing as well as the defendant had represented to him.

[29] The plaintiff submitted that the defendant had been guilty of fraudulent misrepresentations. However, as rightly pointed out by the court, the plaintiff had, by attending the AGM, affirmed his position as a shareholder of WSSB and is precluded from seeking rescission of the share purchase. Instead, the plaintiff seeks to claim damages from the defendant as the actual value of his shares in WSSB was worth much less than the amount paid of RM250,000.

[30] The plaintiff then plucked a figure from thin air and said that the shares are at best worth about RM13,500 based on a multiplier of 1.5 for a medium sized business X annual revenue at RM300,000 (excluding current liabilities of RM473,752). The plaintiff seeks damages of RM236,500 based on that approach.

[31] In defence of the counterclaim, the plaintiff said that he merely replied to the defendant's email to him and as it was the defendant who had copied his reply to the company secretary, the plaintiff's reply to the defendant was accordingly copied to the company secretary.

[32] The plaintiff submitted that the defendant had failed to prove his counterclaim by not calling the company secretary as a witness to prove the publication and whether the plaintiff had been defamed.

[33] In addition, the plaintiff relied on the defences of justification, fair comment and qualified privilege.

SUMMARY OF THE DEFENDANT'S CASE

[34] The defendant denies making any misrepresentation to the plaintiff. The defendant submitted that if the plaintiff had purchased 5% of the equity of WSSB, he would have been made a director with a monthly fee of RM2,499. The defendant denies ever representing that WSSB was worth RM10m and he could not have said that that figure was confirmed by Ernst & Young as Ernst & Young were not even appointed until January 2016. As for the gross income, the defendant alleged that what he said was that the cumulative gross income of WSSB, White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd

A came up to RM1.2m which was a fact. The defendant admitted that he said his vision for WSSB was that it would be listed but no time frame was ever given as to when that would happen.

B **[35]** The defendant submitted that the plaintiff failed to plead the mindset of the defendant in making the alleged misrepresentations and it should be presumed that the plaintiff is saying that the defendant was making innocent misrepresentations.

C **[36]** Since the plaintiff is not entitled to claim damages in respect of innocent misrepresentation and since it is not open to the plaintiff to rescind the contract, having affirmed it by attending the AGM and exercising his right as a shareholder, the plaintiff's claim should be dismissed.

D **[37]** As for the counterclaim, the defendant submitted that he had proved publication to the company secretary and that fact had been admitted by the plaintiff in the pleadings. Since what was published by the plaintiff was clearly defamatory, the defendant seeks general damages and an injunction restraining the plaintiff from publishing defamatory statements of and concerning the
E defendant.

FINDINGS OF THE COURT

F **[38]** As to whether misrepresentations had been made by the defendant to the plaintiff, it is trite law that the burden of proof rests on the plaintiff and he has to satisfy the court on a balance of probability that the defendant had been guilty of misrepresentations.

G **[39]** I am of the view that the defendant could not have represented that Ernst & Young had valued WSSB at RM10m in August 2015, as alleged by the plaintiff, because Ernst & Young did not even come into the picture until January 2016 as they were only appointed then, in respect of the proposed merger with VOffice Sdn Bhd.

H **[40]** In the plaintiff's emails to the defendant on 15 May 2017 and 17 July 2017, the plaintiff said that the defendant had claimed that Ernst & Young had valued WSSB to be RM10m. That seemed to be a reference to what was stated by the defendant during the AGM as the defendant had stated during the AGM that Ernst & Young had valued WSSB at RM12m for purpose of the
I merger exercise.

[41] Because of the inherent improbability of the defendant claiming that Ernst & Young had valued WSSB at RM10m in August 2015 when Ernst & Young were only appointed in January 2016 and had nothing to do with WSSB

in August 2015, I am of the view that the plaintiff had not proved on a balance of probability that the defendant had in fact made the representation in August 2015 that Ernst & Young had valued WSSB at RM10m. The defendant had stoutly denied making such a representation and he said that he came up with the figure of RM500,000 for his 5% shares because that was the figure at which he was willing to sell his shares. He said he was not qualified to say what the value of WSSB was and he did not make that representation to the plaintiff. There is nothing to suggest that the defendant is not telling the truth.

[42] The defendant contended that, taking into consideration the salary of the plaintiff at RM4,000 per month and the director's fee of RM2,499 per month, the plaintiff will get a 6% return on his investment of RM500,000. The plaintiff agreed that this 6% return was one of the reasons he invested in WSSB.

[43] As for the representation about the gross annual income of WSSB being RM1.2m, one only has the evidence of the plaintiff that that representation was made by the defendant. It is inherently improbable that such a representation was made by the defendant as, according to the plaintiff himself, the defendant had shown him the audited accounts of WSSB for the past few years (2012, 2013 and 2014) on the defendant's laptop and the plaintiff can see for himself what the gross income annually of WSSB was. The annual revenue of WSSB as at 31 December 2014 was only RM256,342 and this can be clearly seen from the audited accounts shown to the plaintiff. The plaintiff could easily see that the gross annual income of WSSB for the year ended 31 December 2014 was NOT RM1.2m. The defendant's explanation that he was representing the gross income of WSSB, White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd cumulatively to be RM1.2m is more credible. The defendant explained that he had explained the company structure of WSSB to the plaintiff and shown how WSSB held shares in White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd and, further, that he had shown the audited accounts of all three companies to the plaintiff on his laptop.

[44] The plaintiff had pleaded that he had questioned the defendant about the losses at the three branches as shown in the audited accounts at the material time. If the plaintiff had seen the losses of the three branches as shown in the audited accounts, it is more likely than not that what he had been shown were the audited accounts for WSSB, White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd as the Bangsar and Puchong branches were under White Space (Bangsar) Sdn Bhd and White Space (Puchong) Sdn Bhd respectively and not under WSSB. If the plaintiff had seen the audited accounts for all three companies, and these show that the gross annual income for the year ended 31 December 2014 was cumulatively approximately RM1.2m, this

supports the defendant's version of the facts. Accordingly, there is no misrepresentation made by the defendant as regards the gross annual income of RM1.2m.

[45] As for the potential listing of WSSB, the plaintiff had not proved on a balance of probabilities that the defendant did not genuinely believe at the material time that his vision was to list WSSB and if that happens, there can be no doubt that the plaintiff's shares will be worth a substantial amount. Again, there is no misrepresentation proved by the plaintiff.

[46] Accordingly, I am of the view that the plaintiff had not proved on a balance of probability, that the defendant had been guilty of any misrepresentations.

[47] It is the defendant's submission that in his pleadings, the plaintiff had merely pleaded the particulars of misrepresentations and the facts thereto without pleading the type of representation, whether they were of a fraudulent, negligent or innocent nature. I have carefully scrutinised the statement of claim and the defendant is correct to a certain degree. Certainly the nature of the pleadings of the type of misrepresentation left a lot to be desired. However, I am willing to accept that the plaintiff is pleading fraudulent misrepresentation on the part of the defendant because, in para 25 of the statement of claim, the plaintiff had pleaded the words 'dishonesty' and 'fraud'. However, as earlier stated, I am not persuaded that the plaintiff had discharged the burden of proving any misrepresentation on the part of the defendant.

[48] As to the admissibility of the transcript of what transpired at the AGM, even though the recording was without the knowledge and consent of the defendant, I am of the view that this does not render the transcript inadmissible. Since the plaintiff is the maker of the transcript, it is admissible although I note that the plaintiff has not referred to the transcript in his submission as evidence of any relevant fact.

[49] Even if I had been wrong in holding that the plaintiff had not proved his case on misrepresentation and assuming that the plaintiff had proved that the defendant had been guilty of either fraudulent or negligent misrepresentation, the plaintiff must still prove his loss. When the plaintiff applied a multiplier of 1.5 and put the value of his shares at RM13,500, he was literally plucking a figure from out of thin air and no evidence whatsoever had been adduced by the plaintiff as to the value of his shares. I can do no better than to quote what was stated in the judgment of Edgar Joseph Jr J (as he then was) in the well known case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 where His Lordship said this:

> In all the circumstances, reason and justice point to the inevitable conclusion that

> although the plaintiffs had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages (see *Dixon v Deveridge* and *Twyman v Knowles*).
>
> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang*, namely, that:
>
> > (a) Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying. 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[50] Since the plaintiff is suing for the tort of misrepresentation, damage is an essential element of the cause of action. Since the plaintiff has not proved its damage, I cannot even award nominal damages to the plaintiff but must dismiss his claim which I accordingly do, on the basis that the plaintiff has not proved misrepresentation and, in any event, has failed to adduce sufficient evidence of its loss or damages.

[51] I will now deal with the counterclaim of the defendant where he counterclaimed against the plaintiff in defamation.

[52] I have already set out the wording of the plaintiff's email to the defendant dated 17 July 2017. In the Court of Appeal case of *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242, it was held as follows:

> [10] The law on defamation is rather trite. The onus lies on the plaintiff to establish, on the balance of probabilities, that the impugned statement that the defendant had published had in fact referred to the plaintiff and that it had got the tendency of bearing a defamatory meaning. There must be publication of the alleged defamatory statement and it is publication as soon as it is published to a third person (see *Ayob bin Saub v TS Sambathamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152).

[53] A defamatory statement is clearly defined in *Halsbury's Laws of England* (4th Ed) p 7 to be:

> A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred contempt or ridicule, or to convey an imputation on him disparaging or injurious to his office, profession, calling, trade or business.

[54] Reading the plaintiff's email to the defendant as a whole, I am of the view that it is defamatory of the defendant. In particular, the following words are defamatory:

I know that you have not denied that you have painted a rosy picture that Ernst & Young valued White Space Sdn Bhd to be RM10 million;

It was never agreed that my directorship was upon payment of the full RM500 thousand. Either way, you took the money and use it to pay your debts and took your family on a trip to Japan;

You informed me that I will not become a director but instead I have to work towards becoming one; further to that I have to pay up the remaining RM250 thousand. You think you have any credibility?

It is clear that the value of my shareholdings have never been equivalent to what you have represented to me.

[55] The abovesaid words imply that the defendant has no credibility, is a liar who did not keep his promise and had made false representations to the plaintiff and had improperly used his money in payment of the defendant's debts and on a trip to Japan and had gone back on his promise to make the plaintiff a director.

[56] On the defence of justification, the burden of proof is on the plaintiff to show that the defamatory imputations are true. As I have held that the defendant had not made any misrepresentations to the plaintiff, it stands to reason that the plaintiff would not have succeeded in his defence of justification. The plaintiff has not proved that Ernst & Young did not value WSSB at RM10m and, as will be elaborated later, the plaintiff has also not proved that the defendant had reneged on the promise to make the plaintiff a director provided he purchased 5% shares in WSSB. As for the defendant using the money to pay his debts and taking his family to Japan, the plaintiff has also not proved that that was what the defendant did with the purchase price and even if that was what the defendant used the purchase price for, there was nothing wrong or improper about that, as it was his money to spend how he likes. The plaintiff had implied that the defendant had misapplied the money paid to him by the plaintiff. There was no proof of that.

[57] As for the defence of fair comment, the elements of this defence may be stated thus:

(a) the words complained about must be comment;

(b) the comment must be based on true facts;

(c) the comment, or opinion expressed, must be fair; and

(d) the comment must be on a matter of public interest.

[58] Although some of the defamatory words, such as that the defendant has no credibility, may be said to be comment, they were based on the fact that the defendant had allegedly gone back on his promise to make the plaintiff a

Director of WSSB upon the plaintiff purchasing 5% shares in WSSB. That is a fact which has not been proved sufficiently by the plaintiff. The plaintiff alleged that the defendant had subsequently told the plaintiff that he would not necessarily be made a director even if he were to purchase 5% shares in WSSB but that he had to work towards becoming a director. The defendant denies that and said that as long as the plaintiff purchased 5% shares, he would be made a director. The plaintiff has not proved on a balance of probabilities that the defendant had reneged on his promise to make the plaintiff a director if the plaintiff purchased 5% shares in WSSB. In any event, the comment is not on a matter of public interest. In this case, the subject matter of the comment relates to whether the plaintiff would be made a Director of WSSB and is not a matter of public interest. Therefore, I am of the view that the defence of fair comment does not avail the plaintiff. Further the other defamatory allegations are statements of fact to which the defence of fair comment would not apply.

[59] As for qualified privilege, the categories of occasion which the law treats as privileged are extremely varied but the principal instances can be labelled thus:

(a) statements made between parties who share a common or mutual interest in the subject matter of the communication;

(b) statements made in the discharge of a moral, social or legal duty;

(c) statements made in the protection of one's own self interest; and

(d) fair and accurate reports of certain proceedings.

[60] In this case, the plaintiff submitted that as a shareholder of WSSB, the plaintiff had a legitimate interest in knowing whether the value of the shares purchased equate to what was represented by the defendant and it was the defendant's (sic) legal, social and moral duty to inform the shareholders of matters which have effect on the shareholders of the company.

[61] I do not agree with the plaintiff. The company secretary certainly has no interest in disputes between shareholders as to the value of their shares in the company or when they would be made director and even if it can be said that other shareholders have an interest that cannot be said to be the case of the company secretary. The defendant alleged that the plaintiff was actuated by malice. I do not find evidence of malice on the part of the plaintiff. Obviously the plaintiff felt very aggrieved when he found that the shares he purchased were not as valuable as what he thought they were worth and I accept the plaintiff's explanation that he had mistakenly sent his email to the company secretary because he replied to the defendant's email which the defendant had copied to the company secretary. The publication was only to one person and the plaintiff was not actuated by malice. I take into consideration the fact that

A the plaintiff pleaded the defence of justification and that must have aggravated the feelings of the defendant. However, at the end of the day, the damages suffered by the defendant would not have been very substantial. I award general damages of RM20,000 in favour of the defendant.

B **[62]** In all the premises of the case, I dismiss the plaintiff's claim with costs of RM30,000 subject to allocator. I allow the defendant's counterclaim and grant the injunctive relief sought by the defendant as well as damages of RM20,000 and interest thereon at the rate of 5%pa from date of the order to the date of realisation with costs of RM5,000 subject to allocator.

C *Plaintiff's claim dismissed with costs of RM30,000 subject to allocator; defendant's counterclaim allowed with damages of RM20,000 with interest at the rate of 5%pa.*

D Reported by Nisha Paran

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